A

MARZIDA MANSOR v. LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
M GUNALAN JCA
B AZIMAH OMAR JCA
[CIVIL APPEAL NO: B-03(IM)(NCC)-12-02-2022]
28 MARCH 2023

C **Abstract** – *In determining the validity of a bankruptcy proceeding, the court does not have to look beyond the bankruptcy notice and wantonly impugn the judgment behind the bankruptcy notice, especially when the judgment is not entered in contravention of any statute. A complaint of 'uncertainty' does not warrant a court's intervention to set aside the judgment as a matter of right (ex debito justitiae). The appellate court* D *ought to be slow altogether to set aside any final judgment (especially a final judgment like a summary judgment) when the challenge mounted against that final judgment or order is a mere technicality which does not affect or impugn the merits of the decision.*

E ***BANKRUPTCY:*** *Notice – Setting aside – Validity – Impugning validity of summary judgment obtained by judgment creditor against judgment debtor – Grounds of nullity by uncertainty – Whether summary judgment behind bankruptcy notice entered in contravention of statute – Whether exact stipulation in summary judgment compliant and clear – Whether judgment debtor entitled to* F *set aside summary judgment ex debito justitiae – Whether there was inordinate delay and failure to set aside or vary summary judgment within time – Whether there were clear acts by judgment debtor admitting to correctness of summary judgment – Whether there was appealable error warranting appellate intervention to extent of looking beyond bankruptcy notice*

G ***CIVIL PROCEDURE:*** *Judgments and orders – Summary judgment – Validity of summary judgment obtained by judgment creditor against judgment debtor – Grounds of nullity by uncertainty – Whether summary judgment behind bankruptcy notice entered in contravention of statute – Whether exact stipulation in summary judgment compliant and clear – Whether judgment debtor entitled to* H *set aside summary judgment ex debito justitiae – Whether there was inordinate delay and failure to set aside or vary summary judgment within time – Whether clear acts by judgment debtor admitting to correctness of summary judgment – Whether there was appealable error warranting appellate intervention to extent of looking beyond bankruptcy notice*

I

This was an appeal by the judgment debtor ('appellant') insisting to look beyond a bankruptcy notice, in hopes of impugning the validity of a 13-year-old summary judgment on the ground of nullity by uncertainty. The judgment creditor ('respondent') since 13 years ago had successfully obtained a summary judgment ('13-year-old SJ') against the appellant and another co-defendant company *via* a suit for unpaid Employees Provident Fund ('EPF') contributions. The appellant had neither moved any application to set aside or vary the 13-year-old SJ, nor filed an appeal against the 13-year-old SJ. The respondent obtained leave from the High Court to execute the 13-year-old SJ after the lapsing of the statutory six years' limitation period for execution. Thereupon, the respondent proceeded to file the application for issuance of bankruptcy notice. Only after more than a decade had passed, the appellant had suddenly moved to impugn the validity of the 13-year-old SJ, by filing an application to set aside the bankruptcy notice (encl. 15). The Senior Assistant Registrar ('SAR') allowed encl. 15. Dissatisfied, the respondent appealed to the High Court. The High Court Judge ('HCJ'), in allowing the respondent's appeal and reversing the SAR's decision, held that (i) for judgments entered into under the Employees Provident Fund Act 1991 ('EPF Act'), s. 46 of the EPF Act applied. Thus, although a judgment may not clearly provide for joint and several liabilities, the operation of s. 46 of the EPF Act automatically prescribes the joint and several liabilities between a company and its directors. Thus, the respondent was well within its rights to pursue the entirety of the judgment sum against the appellant; (ii) it was well within the respondent's rights to claim for late payment charges although such charges were not explicitly mentioned in the 13-year-old SJ (as late payment charges are statutorily provided for in cases under the EPF Act as per s. 46); (iii) the part payments made by the appellant were certainly lacking any cohesive evidence in support to prove an 'outside agreement' which would have ousted the respondent from its entitlement to rely on the 13-year-old SJ. Hence, this appeal. The issues that arose were whether the HCJ erred in facts and law (i) when failing to decide that the bankruptcy notice dated 13 September 2019 was defective and void as the summary judgment dated 14 May 2009 was uncertain; (ii) when failing to decide that the summary judgment was governed by an agreement where the appellant had made payment to the respondent; (iii) when failing to decide that the bankruptcy notice was invalid and void on the grounds that the respondent claimed for dividends till 2019 and not 2002 as the summary judgment only stated interests and not late payment charges; and (iv) when failing to decide that the interests or late payment charges were interests declared by the respondents themselves. Thus, the summary judgment was not clear. The appellant also submitted two main grounds which were elements of uncertainty in the judgment obtained as it prescribed interests in the future, and the existence of an outside agreement or the compromise agreement between the appellant and the respondent where the appellant had made payments towards the judgment for a period of ten years.

Held (dismissing appeal)
Per Azimah Omar JCA delivering the judgment of the court:

(1) As against the issue of alleged ambiguity of interest rate/non-inclusion of late payment charges, the current amended s. 49(1) of the EPF Act provides that the late payment charges are statutorily chargeable against unpaid contributions (arrears) at a rate to be calculated/determined by the board. The appellant's alleged ambiguity could be completely debunked simply by appreciating the amendments that had been gazetted upon s. 49(1) of the EPF Act. In actuality, interest and late payment charges mean the same thing. Prior to the 2016 amendment, s. 49 used the term 'interest' instead of late payment charges but post 2016 amendment, the term 'interest' was replaced by 'late payment charges' (Employees Provident Fund (Amendment) Act 2016). Considering the history of the amendments, it would be inaccurate to conclude that the 13-year-old SJ did not at all provide for the imposition of late payment charges when in actuality it already did. Thereto, the 13-year-old SJ indeed already provided for the imposition of late payment charges. Thus, there was neither such ambiguity nor nullity as against the bankruptcy notice for claiming for the statutorily prescribed late payment charges stipulated in s. 49 of the EPF Act. (paras 24-26)

(2) In determining the validity of a bankruptcy proceeding, the bankruptcy court ought not to look beyond the bankruptcy notice and wantonly impugn the judgment behind the bankruptcy notice (or impugn the validity of the debt behind the judgment). A summary judgment could only be granted upon the court's appropriate examination into the merits of the case. Thus, it was erroneous and far too presumptuous that a procedural irregularity or impediment as to the 'rate of interest' would automatically impugn the entire decision of the court on merits. Going by s. 72 of the Courts of Judicature Act 1964, even if there was any legitimacy to the appellant's cry for nullity/irregularity, it was obvious that the alleged uncertainty did not affect the merits of the 13-year-old SJ. The appellant's case fell short for setting aside the 13-year-old SJ merely on a supposed uncertainty as to the rate of late payment charges imposable. It was also never the case of the appellant that the 13-year-old SJ was entered in contravention of any statute. Thus, at this early juncture *per se*, it was obvious that the appellant's complaint of 'uncertainty' did not warrant this court's intervention to set aside the 13-year-old SJ as a matter of right (*ex debito justitiae*). (paras 27-33)

(3) By all means and avenues, the exact stipulation in the 13-year-old SJ was statutorily compliant and clear. The stipulation was in clear reference to a statutorily set and provided rate under a statute (the EPF Act) and in clear adoption of the exact terms and wordings of the statutorily set rate under the EPF Act. It was erroneous for the appellant to insist that

the 13-year-old SJ reference to 'interest at the rate declared by the plaintiff for the years 1999 until 2002 until full settlement' was an 'uncertainty' when the terms used were certainly provided for under a statute. Since there was never any proof that the terms of the 13-year-old SJ was in contravention of any statute, there was no reason for this court to overreach itself and go behind the bankruptcy notice to examine the 13-year-old SJ. Thus, the appellant was certainly not entitled to set aside the 13-year-old SJ *ex debito justitiae*. (paras 36 & 41)

(4) Although the court has the discretion to excuse delays in applications to set aside judgments, extreme or inordinate delays defeat justice and shall still be inexcusable. The appellant was not excused or precluded from the due process and procedure to apply for variation or setting aside of the SJ which was properly entered under the ROC 2012. Thereto, the appellant could not expect this court to turn a blind eye and ignore the long drawn out 13 year delay since the granting of the 13-year-old SJ. Even to date, the appellant had never filed any application to set aside or vary the 13-year-old SJ. The present appeal was merely addressing the appellant's application to set aside the bankruptcy notice and not any application to set aside or vary the 13-year-old SJ. (paras 28, 42 & 43)

(5) It was far too presumptuous for this court to presume this 'outside agreement' merely because the appellant had (in breach of the 13-year-old SJ) only partly paid the judgment sum up to a meagre sum of less than 10% of the judgment sum since, as at 2018. The appellant could not expect to conclude an 'outside agreement' with an 'ouster clause' (allegedly ousting the respondent's entitlement to rely on the 13-year-old SJ) merely by exhibiting proof of payments which did not even come up to 10% of the judgment sum. Quite to the contrary, the part payments made and admitted would instead work against the appellant as the payments (without any protest) were clear acts admitting the truth and correctness of the 13-year-old SJ. If indeed the appellant had any genuine interest against the terms of the SJ, then the appellant would not have directly proceeded to serve and partly pay the judgment sum. The appellant could not expect this court to allow the appellant to pay towards and admit the validity of the SJ in one breath, and deny the validity of the same in the same breath. It would be severely remiss and unbecoming of this court to allow the appellant to renege against the position it had taken for the past 13 years. There must be finality in litigation and the respondent could not be denied its rightful reliance upon the validity of the 13-year-old SJ which was never formally challenged. It was infinitely more probable than not that the appellant was well aware of and had well admitted to the validity and correctness of the 13-year-old SJ. (paras 51-55)

A **(6)** There was no appealable error which would warrant this court's appellate intervention to the extent of looking beyond the bankruptcy notice. The court ought to be barred from delving beyond the judgment and examine the validity of the debt. The appellate court ought to be slow altogether to set aside any final judgment or order (especially a final
B judgment like a summary judgment) when the challenge mounted against that final judgment or order was a mere technicality which did not affect or impugn the merits of the decision. (paras 56 & 57)

Case(s) referred to:
Affin Credit (1991) Sdn Bhd v. Dato' Hj Raun Djalil Atmosumarto [2004] 4 CLJ 337 CA ***(refd)***
C
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals [2012] 2 CLJ 16 CA ***(refd)***
International Islamic University Malaysia v. Mohd Adnan Adrian Paul Holden Abdullah
D *[2015] 1 LNS 249 CA* ***(refd)***
Lee Tain Tshung v. Hong Leong Finance Bhd [2000] 4 CLJ 15 HC ***(refd)***
Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan [2020] 1 LNS 226 CA ***(refd)***
Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC
E ***(refd)***

Legislation referred to:
Court of Judicature Act, s. 72
Employees Provident Fund Act 1991, ss. 46, 49(1)
Rules of Court 2012, O. 2 r. 1(2), O. 42 r. 12

F *For the appellant - T Gunaseelan & Keshvinjeet Singh Sidhu; M/s Gunaseelan & Assocs*
For the respondent - Balqis Mohamad Shahril; M/s Azrul Afifi & Azuan

[Editor's note: Appeal from High Court, Shah Alam; In Re Bankruptcy No: BA-29NCC-5543-09-2019 (affirmed).]

Reported by Suhainah Wahiduddin
G

JUDGMENT

Azimah Omar JCA:

Introduction

H

[1] The appeal before this court is an appeal by a 13 year judgment debtor (the appellant) insisting to look beyond a bankruptcy notice (in hopes of impugning the validity of a 13-year-old summary judgment on the ground of nullity by uncertainty).

I **[2]** It is pertinent to note that to date (save for the appellant's challenge against the respondent's present bankruptcy action), the appellant has neither moved any application to set aside, vary, nor appealed against the entry of the 13-year-old summary judgment.

[3] The factum of delay is sorely obvious and undisputable. Nonetheless, the appellant beckons this appellate court's discretion and inherent jurisdiction to absolve the appellant's apparent indolence and set aside the 13 years old summary judgment on the argument that the summary judgment was null and void *ex debito justitiae* for an alleged want of certainty.

[4] Apart from the appellant's strenuous contention on nullity, the appellant also seeks to disentitle the respondent from basing any bankruptcy action on the summary judgment on the ground that the parties have somehow reached a 'compromise' outside the ambit of the 13-year-old summary judgment.

[5] Be that as it may, it is pertinent to first appreciate the facts of the case so as to build the appropriate foundation as well as context to properly determine the issues above.

Facts Of The Case

[6] The respondent ("judgment creditor/JC"), since 13 years ago, has successfully obtained a summary judgment dated 14 May 2009 ("13-year-old SJ") against the appellant ("judgment debtor/JD") and another co-defendant company *via* suit No S7-21-147-2003 for unpaid Employees Provident Fund ("EPF") contributions. The 13-year-old SJ orders and prescribes the appellant's indebtedness in the following manner:

(i) judgment sum of RM448,691;

(ii) dividend at 6.48% a year for the year 1999, at 6% a year for the year 2000, at 5% a year for the year 2001, and at 4.25% a year for the year 2002 until full settlement;

(iii) interest at the rate declared by the plaintiff for the years 1999 until 2002 until full settlement; and

(iv) cost.

[7] It is admitted and undisputed that even to date the appellant JD has neither moved any application to set aside or vary the 13-year-old SJ, nor file any appeal against the 13-year-old SJ.

[8] On 13 December 2018, the respondent obtained leave from the High Court to execute the 13-year-old SJ after the lapsing of the statutory six years' limitation period for execution.

[9] Thereupon, the respondent proceeded to file the application for issuance of bankruptcy notice on 13 September 2019. Only after more than a decade has passed, the appellant has suddenly moved to impugn the validity of the 13-year-old SJ (by filing an application to set aside the bankruptcy notice on 17 December 2019 ("encl. 15")).

[10] The Senior Assistant Registrar ("SAR") allowed encl. 15 on 24 July 2020. The SAR allowed as such on the following grounds:

(i) the bankruptcy notice was defective as it claims for the entire judgment sum against one singular debtor (considering that the 13-year-old SJ did not state a joint and several liabilities between co-debtors);

(ii) the part payments/instalment payments by the appellant JD were evidence of a 'compromise' struck. Thus, there was already an 'outside agreement' governing the appellant's debt which is already beyond the ambit of the 13-year-old SJ; and

(iii) the bankruptcy notice was defective as it imposed late payment charges (which allegedly was not provided for in the 13-year-old SJ).

[11] Dissatisfied with the SAR's decision, the respondent appealed to the High Court. Upon astute consideration and analysis, the learned HCJ has allowed the respondent's appeal and thereby reversed the SAR's decision to set aside the bankruptcy notice. The learned HCJ allowed the respondent's appeal mainly on the following grounds:

(i) in specific cases involving the EPF Act, the statutory provisions of the EPF Act prevail over the 13-year-old SJ. For judgments entered into under the EPF Act, s. 46 of the EPF Act applies. Thus, although a judgment may not clearly provide for joint and several liabilities, the operation of s. 46 of the EPF Act automatically prescribes the joint and several liabilities between a company and its directors. Thus, the respondent is well within its rights to pursue the entirety of the judgment sum against the appellant (see *Lembaga Kumpulan Wang Simpanan Pekerja v. Edwin Cassian Nagappan* [2020] 1 LNS 226);

(ii) on the same score that the EPF Act shall prevail over judgments (as was enlightened by the eminent Federal Court in *Edwin Cassian*'s case), it was well within the respondent's rights to claim for late payment charges although such charges were not explicitly mentioned in the 13-year-old SJ (as late payment charges are statutorily provided for in cases under the EPF Act as per s. 46 of the EPF Act. There is no uncertainty and therefore there is no nullity to render the 13-year-old SJ invalid; and

(iii) the part payments made by the appellant (which only came up to less than 10% of the total judgment debt (RM39,500 as at 24 August 2018)) are certainly lacking any cohesive evidence in support to prove an 'outside agreement' which would have ousted the respondent from its entitlement to rely on the 13-year-old SJ. There was no documentary evidence ever exhibited to prove such 'outside agreement'. It is more probable than not that this 'outside agreement' is merely an afterthought and a figment of the appellant's imagination.

[12] Hence, the matter has now come before this Court of Appeal considering the appellant's appeal against the learned HCJ's decision reversing the decision of the SAR.

[13] In challenging the learned HCJ's decision, in her memorandum of appeal, the appellant has advanced the following grounds:

(i) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila telah membenarkan rayuan Responden/Pemiutang Penghakiman kepada Hakim Dalam Kamar (encl. 37) terhadap keputusan Penolong Kanan Pendaftar yang diberikan pada 24-07-2020 dengan kos;

(ii) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal memutuskan bahawa Notis Kebankrapan bertarikh 13-09-2019 adalah cacat dan defektif atas alasan bahawa Penghakiman bertarikh 14-05-2009 adalah tidak menentu;

(iii) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal memutuskan bahawa Penghakiman bertarikh 14-05-2009 adalah dikawal oleh satu perjanjian luar yang mana Perayu telah membuat bayaran kepada Responden;

(iv) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang- undang apabila gagal memutuskan bahawa Notis Kebankrapan bertarikh 13-09-2019 adalah tidak sah dan terbatal atas alasan bahawa dalam butir-butir tuntutan dalam Notis Kebankrapan, Responden telah menuntut dividen sehingga tahun 2019 dan bukan sehingga 2002 seperti yang diperuntukkan dalam Penghakiman dan Penghakiman bertarikh 14-05-2009 hanya menyebut faedah dan bukan caj lewat bayar; dan

(v) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal memutuskan bahawa faedah (atau caj lewat bayar) tersebut adalah faedah yang telah diisytiharkan oleh Responden sendiri. Oleh itu, ini menjadikan Penghakiman bertarikh 14-05-2009 tidak jelas.

Translation (English)

(i) The learned High Court Judge has erred in facts and law by allowing the respondent/Judgment Creditor's appeal to the Judge in Chambers (encl. 37) against the decision of the Senior Assistant Registrar dated 24.07.2020 with costs;

(ii) The learned High Court Judge has erred in facts and law when failed to decide that the bankruptcy notice dated 13.09.2019 is defective and void as the Judgment dated 14.05.2009 is uncertain;

(iii) The learned High Court Judge has erred in facts and law when failed to decide that the Judgment dated 14.05.2009 is governed by an agreement where the appellant has made payment to the respondent;

(iv) The learned High Court Judge has erred in facts and law when failed to decide that the bankruptcy notice dated 13.09.2019 is invalid and void on the grounds that the respondent claimed for dividend till 2019 and not 2002 as the Judgment dated 14.05.2009 only stated interests and not late payment charges;

A *(v) The learned High Court Judge has erred in facts and law when failed to decide that the interests (or late payments charges) are interests declared by the respondents themselves. Thus, the Judgment dated 14.05.2009 is not clear.*
(emphasis added)

[14] Even though in the memorandum of appeal, the appellant had raised
B five grounds in appealing against the HCJ's decision, basically there are only four grounds for this court's consideration in this appeal, namely; grounds (ii), (iii) (iv) and (v). It must be noted that grounds (ii), (iv) and (v) are inter-related and therefore, they must be dealt with together.

[15] However, this court must also mention that there are two other
C grounds taken by the appellant to challenge the validity of the bankruptcy notice before the SAR, they are: (i) the joint and several liability between company and directors under the EPF Act and (ii) leave to execute judgment after six years have lapsed.

[16] Nevertheless, when the appeal was called for hearing before us, the
D counsel for the appellant, Mr Gunaseelan had informed us that he will not pursue the joint and several liability between company and directors' issue; and the issue that the JC had not obtained leave to execute judgment after six years had lapsed. Mr Gunaseelan had also informed us that his submission will be essentially focused on the other two main grounds *ie*,
E (i) elements of uncertainty in the judgment obtained by the JC as it prescribes interest in the future; and (ii) the existence of outside agreement or the compromise agreement between the JD and JC where the JD has made payments towards the judgment for a period of ten years.

F **Joint And Several Liability Between Company And Directors Under The EPF Act**

[17] Even though this court duly noted the counsel for appellant is not pursuing with the issue of the joint & several liability between company and directors under the EPF Act, *ie*, the specific limb of argument regarding the
G respondent's bankruptcy notice which claims for the entirety of the indebtedness (although the 13-year-old SJ does not expressly provide for joint and several liabilities).

[18] Nonetheless, it is opportune to appreciate and set the appropriate tone to delve into deliberations in view of the scintillating principle propounded
H very recently by the Federal Court in the *Edwin Cassian* case. In *Edwin Cassian*'s case, the Federal Court had to deal with the issue of reading and interpreting a court order and judgment under the EPF Act where it was not stated that the liabilities between co-debtors were joint and several. It was astute and instructive that the Federal Court has decided in line with the *lex*
I *specialis derogat legi generali* maxim (in that the EPF Act and all of its provisions shall prevail and take precedence over the terms of the judgment

or order). Thus, when a judgment or order was rendered for a liability to pay specifically under the EPF Act, it is incumbent upon the courts to give full effect to all of the provisions of the EPF Act:

> The EPF Act
>
> The instant appeal concerns a consent judgment entered into between the parties. Of primary importance is s. 46 of the EPF Act which imposes joint and several liability on the directors of a company for unpaid contributions. *These provisions must be given full effect, as they comprise statutory law. It is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions, by construing judgments in manner which is not consonant with the EPF Act. In short, the EPF Act prevails over the terms of the judgment.* (emphasis added)

[19] Thus, the quintessential core of the Federal Court's *ratio* is that:

(i) the EPF Act shall take precedence and prevail over the judgment or order;

(ii) the provisions of the EPF Act are statutory in nature and should be given full effect;

(iii) the judgment or order shall be read and interpreted to yield to the statutory provisions contained in the EPF Act; and

(iv) the EPF Act shall be read together alongside the judgment or order for the most appropriate statutory interpretation of the judgment or order.

[20] With these core principles in mind, the Federal Court decided that the judgment shall be read to include the joint and several liabilities between directors and companies although such joint and several liabilities were not stated within the judgment or order. And this court must remark *in limine* that these principles would similarly demystify and negate the appellant's supposed contention of nullity by uncertainty. In any case, at this juncture, the learned HCJ has correctly found that the liabilities under the 13-year-old SJ shall be read to mean joint and several liabilities (in accordance with the EPF Act).

Demystifying The Alleged Nullity By Uncertainty Regarding The Imposition Of Interest Or Late Payment Charges

[21] It is interesting to note that, it seems as though the appellant's argument on nullity morphs from one stance to another 'innovative' argument. At first glance, it seems as though the argument was simply that the bankruptcy notice was a nullity as the 13-year-old SJ does not provide for imposition of any late payment charges. Hence why the learned HCJ's line of decision revolves around the issue whether or not the respondent is statutorily entitled to claim for the late payment charges (which the respondent is indeed statutorily entitled to under the post-2016 amendment s. 49(1) of the EPF Act.)

[22] However, upon this appeal at the Court of Appeal, the argument seems to have been innovated anew (in that now the 13-year-old SJ is a nullity) because it is uncertain of the 'interest rate' chargeable under the same SJ.

[23] Thus, to be absolutely clear and certain of the appellant's beguiling shift of stances, this court ascertained that the appellant is now contending nullity on two fronts:

(i) nullity against the bankruptcy notice in claiming for late payment charges; and

(ii) nullity against the 13-year-old SJ for uncertainty of interest rate imposable under the same SJ.

D(i): Alleged Nullity Against The Bankruptcy Notice In Claiming For Late Payment Charges

[24] As against the issue of alleged ambiguity of interest rate/non-inclusion of late payment charges, the current amended s. 49(1) of the EPF Act provides that the late payment charges are statutorily chargeable against unpaid contributions (arrears) at a rate to be calculated/determined by the board.

[25] The appellant's alleged ambiguity can be completely debunked simply by appreciating the amendments that had been gazetted upon s. 49(1) of the EPF Act. In actuality, interest and late payment charges mean the same thing. Prior to the 2016 amendment, s. 49 used the term "interest" instead of late payment charges. But post the 2016 amendment, the term "interest" was replaced by "late payment charges" (see Employees Provident Fund (Amendment) Act 2016):

> 10. Amendment of section 49
>
> Section 49 of the principal Act is amended:
>
> (a) in the shoulder note, by substituting for the word "Interest" the words "Late payment charges";
>
> (b) in subsection (1), by substituting for the word "interest" the words "late payment charges"; and
>
> (c) in subsection (2), by substituting for the word "interest" the words "late payment charges".

[26] Considering the history of the amendments above, it would be inaccurate to conclude that the 13-year-old SJ does not at all provide for the imposition of late payment charges when in actuality it already did. Thereto, the 13-year-old SJ indeed already provided for the imposition of late payment charges (only that it was termed as 'interest' prior to the 2016 amendment). Thus, there is neither such ambiguity nor nullity as against the bankruptcy notice for claiming for the statutorily prescribed late payment charges stipulated in s. 49 of the EPF Act.

D(ii): Alleged Nullity Against The 13 Years Old Sj For Uncertainty Of Interest Rate Imposable Under The Same SJ

[27] It is pertinent to highlight here that what the appellant is seeking from this appellate court is a request for this court to turn a blind eye from the decade plus judgment non-challenged by the appellant and part payments in admission of the appellant's indebtedness under the 13-year-old SJ.

[28] Equally important to the principle of nullity by uncertainty, are also the following time-celebrated and hallmark principles of the law:

(i) in determining the validity of a bankruptcy proceeding, the bankruptcy court ought not to look beyond the bankruptcy notice and wantonly impugn the judgment behind the bankruptcy notice (or impugn the validity of the debt behind the judgment) (see COA in *Affin Credit (1991) Sdn Bhd v. Dato' Hj Raun Djalil Atmosumarto* [2004] 4 CLJ 337;

(ii) although the court has discretion to excuse delays in application to set aside judgments, extreme or inordinate delays defeat justice and shall still be inexcusable (see COA in *Lee Tain Tshung v. Hong Leong Finance Bhd* [2000] 4 CLJ 15; [2000] 3 MLJ 364);

(iii) the *ex debito justitiae* rule to set aside judgments only applies when it is proven that the judgment was entered into in contravention of a statute (see *Lee Thain Tshung* (*supra*));

> It is important to notice in Gopal Sri Ram JCA's judgment (above) that the judge was careful not to use the word 'void' in reference to orders of a court of unlimited jurisdiction in the sense that they can be ignored or disobeyed with impunity. He said, at p. 426,'Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. *But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose'*. As long as an irregular order stays it must be observed unless and until it is set aside. An irregular order, even where it has been described as 'void' or 'a nullity', stands as an effective order and cannot be ignored with impunity unless and until it is set aside. That is why Gopal Sri Ram JCA said this in *Tenaga Nasional Bhd v. Prorak Sdn Bhd*, at p. 488: 'It is settled law that the expressions 'nullity', 'void' and 'voidable' are wholly inappropriate to describe an order made by a court of unlimited jurisdiction'.
>
> *The present case is not a case where the court had acted in contravention of any statute* when it gave judgment for the plaintiff in 1987. Therefore, Mr Lim's submission that he could rely on O. 92 r. 4 to have the judgment set aside because it was entered for too much is misconceived and I have no hesitation in rejecting it. (emphasis added)

(iv) if there shall be any error as to the amount stated in a judgment or order (which was not a matter of merit), then the court also holds discretion and power under O. 2 r. 1(2) of the Rules of Court 2012 to amend the judgment or order (and not simply setting it aside) (see *Lee Thain Tshung* (*supra*).

[29] Thus, against the Federal Court's decision in *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241; [1996] 1 MLJ 30 (which the appellant touted to be instructive in the present appeal), this court must also keep strictly in mind all these subsequent COA decisions which have further expanded on the initial principle expounded by the Federal Court in *Tuan Hj Ahmed Abdul Rahman*'s case in 1996.

[30] Now, one of the most pertinent distinguishing factors between the case of *Tuan Hj Ahmed* and the present appeal is the nature of the judgments involved. In *Tuan Hj Ahmed*, the Federal Court had to deal with a judgment in default (which has yet to be decided on its merits). In stark contrast, the present appeal deals with a summary judgment (which is a final judgment which was already decided on its merits).

[31] It is trite law that, the threshold to set aside a JID is altogether a different threshold than that of a final judgment on merits like a summary judgment. The former JID can be entered purely on procedural operation of the law while the latter summary judgment can only be granted upon the court's appropriate examination into the merits of the case. Thus, it is erroneous and far too presumptuous that a procedural irregularity or impediment as to the 'rate of interest' would automatically impugn the entire decision of the court on merits. This distinction has been eloquently deliberated by the COA in the case of *International Islamic University Malaysia v. Mohd Adnan Adrian Paul Holden Abdullah* [2015] 1 LNS 249; [2015] 5 MLJ 686:

> For the removal of doubt, we hasten to clarify that *there is a distinction between the affidavit of merits to support an application to set aside a judgment in default and an affidavit opposing an application for summary judgment*. In the latter, it must demonstrate that there are triable issues, being issues, whether of law or fact but which relies on a foundation of facts that is disputed and the determination of those disputed facts require testing of oral evidence, or other evidence requires oral explanation in a trial. *But where the object of an application is to set aside a judgment in default, the affidavits of merits need demonstrate that the judgment in default results in an injustice on the merits even if the defendant had failed in compliance with the procedural requirements*. There must, therefore, be an affidavit of merits to provide the foundation upon which a finding may be made that there is an issue, whether of fact or law or both, upon which the applicant ought to be heard for a fair and just decision and therefore the judgment in default ought to be set aside.

> The obvious point is that, as established in *Buga Singh v. Koh Bon Keo* a mistake not demonstrated to have affected the merits of the judgment is not ground for intervention (see as illustration *Muhammad Sanusi Md Nor lwn Sobri Sudin* [2014] 1 LNS 91). *A technical non-compliance may be relied upon as an excuse to win a case but it can never replace the fairness and justice of a decision on the merits*. We find affirmation of this view in s. 72 of the Courts of Judicature Act 1964 ('Act 91') which provides that *'No judgment or order of the High Court, or of any Judge, shall be reversed or substantially varied on appeal*, nor a new trial ordered by the Court of Appeal, *on account of any error, defect, or irregularity, whether in the decision or otherwise not affecting the merits* or the jurisdiction of the court'. (emphasis added)

[32] Thus, going by the COA's *ratio* and s. 72 of the Court of Judicature Act, even if there was any legitimacy to the appellant's cry for nullity/ irregularity, it is obvious that the alleged uncertainty does not affect the merits of the 13-year-old SJ (and by operation of the same provision, the 13-year-old SJ ought not to be set aside or substantially varied.)

[33] Going by the current state of the law, it is thoroughly apparent that the appellant's case falls short for setting aside the 13-year-old SJ merely on a supposed uncertainty as to the rate of late payment charges imposable. It was also never the case of the appellant that the 13-year-old SJ was entered in contravention of any statute. Thus, at this early juncture *per se*, it is absolutely obvious that the appellant's complaint of 'uncertainty' does not warrant this court's intervention to set aside the 13-year-old SJ as a matter of right (*ex debito justitiae*).

[34] The alleged uncertainty (if there was indeed any) at best would only be a matter of mathematics and calculations which is far from any question on merits.

[35] A further point of distinguishment would be the question of uncertainty itself in *Tuan Hj Ahmed*'s case. In *Tuan Hj Ahmed*'s case, the uncertainty argued upon was regarding the clear absence of a prescribed rate of interest stipulated in the JID. The JID also did not make any reference as to where the ascertained rate of interest can be found. Totally different in the present appeal, the prescribed rate of interest *cum* late payment charges prescribed in the 13-year-old SJ is exactly as per the statutory terms of s. 49(1) of the EPF Act. The section reads:

> Where the amount of the monthly contributions or part of any monthly contributions which an employer is liable to pay under section 45 is not paid within such period as prescribed by the Minister, the employer shall be liable, in addition to the dividend to be paid under subsection 45(3), **to pay late payment charges to be credited to the Fund on such amount at such rate and in accordance with any manner and calculation determined by the Board**. (emphasis added)

[36] Thus, by all means and avenues, the exact stipulation in the 13-year-old SJ was statutorily compliant and clear. Vastly different from the *Tuan Haji Ahmed*'s case, the 13-year-old SJ's stipulation was:

(i) in clear reference to a statutorily set and provided rate under a statute (the EPF Act); and

(ii) in clear adoption of the exact terms and wordings of the statutorily set rate under the EPF Act.

[37] It is erroneous for the appellant to insist that the 13-year-old SJ's reference to "interest at the rate declared by the plaintiff for the years 1999 until 2002 until full settlement" is an 'uncertainty' when the terms used were certainly provided for under a statute. There is no uncertainty and ambiguity here. The rate was specific and explicit in that:

(i) it was the rate explicitly provided for under s. 49 of the EPF Act; and

(ii) it was the rate declared by the board under s. 49 of the EPF Act for the years 1999 until 2002. Thus, it is explicit and vividly clear that the applicable rate is simply the rate declared by the board between 1999 and 2002, which then shall remain at that rate until full settlement.

[38] To this court's mind, the mechanics of the imposable rate under the EPF Act are no different than the manner and method of calculation for a judgment interest under the Rules of Court 2012 ("ROC 2012"). Under O. 42 r. 12 of the ROC 2012, the imposable rate of judgment interest is as per the rate "the Chief Justice may from time to time determine". Thereafter, the imposable rate is simply the rate which was determined by the Chief Justice at the material time *via* any practice direction.

[39] Thus, for the appellant to insist that this mechanism is inherently a nullity would equally impugn the correctness of the same mechanism which had been put in place and practised for years without any protest or confusion by any parties. The only confusion or uncertainty here is the appellant's failure to set up a proper challenge as to the calculation made in the bankruptcy notice. Rather than beckoning this court's inherent discretion, the appellant should have come forth in earnest sincerity by simply exhibiting to this court, that the respondent had imposed a rate which is in excess of the rate statutorily declared by the board between the years 1999 and 2002.

[40] The appellant could by all means embark on his mathematical endeavour and furnish this court the proper calculation of the appellant's indebtedness as compared to the respondent's calculation. But this is exactly the earnest endeavour which the appellant willingly failed and refused to do. As a matter of fact, the appellant has not been fully candid to this Court of Appeal in not even alluding to the mechanism of s. 49 of the EPF Act.

Instead, the appellant only hopes to spur fleeting doubts and intentionally leave this court in the ether of the 'unknown' to embark on its own expedition to unearth the truth.

[41] Therefore, since there was never any proof that the terms of the 13-year-old SJ was in contravention of any statute, there is no reason for this court to overreach itself and go behind the bankruptcy notice to examine the 13-year-old SJ. Thus, borrowing the wisdom of the COA in *Lee Thain Tshung*, the appellant is certainly not entitled to set aside the 13-year-old SJ *ex debito justitiae*. Thus, even if this court was wrong (and there was a degree of irregularity in the terms of the 13-year-old SJ), the same SJ shall remain enforceable and valid until and unless there was a proper application to vary the same (which the appellant is sorely out of time to do).

The Appellant's Inordinate Delay And Failure To Apply To Set Aside Or Vary The 13 Years Old SJ Within Time

[42] Considering the conclusion above, it is opportune now to delve into the appellant's apparent indolence and admission to the correctness of the 13-year-old SJ. As found earlier, the appellant is not entitled to set aside the 13-year-old SJ *ex debito justitiae*. Thus, (starkly different from the *Tuan Hj Ahmed* case) the appellant is not excused or precluded from the due process and procedure to apply for variation or setting aside of the SJ which was properly entered under the ROC 2012. Thereto, the appellant cannot expect this court to turn a blind eye and ignore the long-drawn-out 13 years delay since the granting of the 13-year-old SJ. It must strictly be kept in mind that even to date, the appellant has never filed any application to set aside or vary the 13-year-old SJ.

[43] It must also be emphasised that the present appeal is merely addressing the appellant's application to set aside the bankruptcy notice and NOT any application to set aside or vary the 13-year-old SJ. This is yet another distinguishing fact of the present appeal as compared to the *Tuan Hj Ahmed*'s case:

(i) in *Tuan Hj Ahmed*'s case, the FC dealt with an application to set aside a JID which was filed only three years out of time; and

(ii) in contrast, in the present case, the appellant had not filed any application to set aside or vary the SJ even after 13 years.

[44] Against the extremity of the appellant's delay, the appellant can only hope that she would be entitled to set aside the 13-year-old SJ as a matter of right (which she definitely is not entitled to do).

[45] It is far more fruitful and appropriate to examine the appellant's inordinate delay through the lens of the COA when it dealt with the case of *Lee Thain Tshung*. In *Lee Thain Tshung*, the COA dealt with an application to set aside a judgment which was filed eight years out of time. In dismissing

A the appeal, the COA had explicitly found that the eight years' inordinate delay had effectively precluded the appellant from seeking the aid of the law due to his own indolence and delay:

> However, the appellant was not entitled to have the judgment, *even though it was irregular, set aside under O. 2 r. 2 because his summons to set aside had not*
B *been issued within a reasonable time. By allowing eight years to elapse after the irregular judgment had been obtained against him before taking action on it had precluded him from being allowed to have the judgment set aside* because of his unreasonable delay in making the application. (emphasis added)

[46] On the same score, it is excruciatingly clear that the delay occasioned
C in the present appeal is effectively almost five times the delay that was occasioned in the *Tuan Hj Ahmed* case, and almost twice the delay occasioned in *Lee Thain Tshung*. There were never any explanations afforded by the appellant to justify the delays.

The Outside Agreement

D

[47] This court must also mention that despite failing miserably to provide any explanations to justify the delays, the appellant had instead sought to prove an 'outside agreement' or 'compromise' beyond the ambit of the 13-year-old SJ which has governed the debt over the years since the issuance of the 13-year-old SJ.

E

[48] In response to the existence of the outside agreement overriding the judgment raised by the appellant, the counsel for the respondent had argued that the agreement has got nothing to do with the summary judgment obtained by respondent against the appellant in this case. According to the
F counsel for the respondent the outside agreement if any, is in respect of some other proceedings that the appellant has with the respondent and it is obviously not related to present appeal before this court.

[49] Counsel for the appellant strenuously argued that there was such compromise as the appellant had in her para. (13) of the affidavit in support
G (AIS) affirmed on 17 December 2019 averred that she had paid the sum of RM39,500 towards the judgment as at 24 August 2018. (see para. 13 AIS). Counsel for the appellant further argued that against such averment, the respondent had only stated this:

> Perenggan 2, 3, 13 di bawah tajuk/perkara Notis Kebankrapan adalah
H tidak sah dan diketepikan dan/atau dibatalkan dalam Afidavit Penghutang Penghakiman tersebut adalah tidak sama sekali berkaitan dan relevan di sini memandangkan persetujuan dan bayaran yang dinyatakan adalah berkaitan dengan tindakan guaman yang lain ...

> It was contended by the counsel for the appellant that by such reply, the
I respondent, in other words, had accepted that payments were made by the appellant. In this case, the respondent had merely said that the payment was made for some other actions. Hence, it was for the respondent to show which other action were these payments made

towards? Relying on section 106 of the Evidence Act, 1950, the counsel further submitted that when something is peculiarly within the knowledge of a party, therefore, it is for that party to show that it was something else or some other action. If the respondent failed to show specifically which other cases/proceedings that payments were made for by the appellant, thus, a reasonable inference must be drawn that payments were being made towards this account and no action taken. And therefore, the reasonable inference is that, there was an outside agreement.

[50] In respect of the outside agreement contention, this court agrees with the counsel for the respondent that respondent had rebutted that the amount RM39,500 paid by the appellant clearly was not for this case (the summary judgment obtained on 14 May 2009), it was payment for some other proceedings that the appellant has with the respondent.

[51] Be that as it may, this court is very much aware that it is commonplace that parties in a litigation can and have since time immemorial agreed to manners and methods of instalment payments to promote a feasible manner of compliance and settlement of the judgment debt. It is also commonplace that these agreements can be agreed without prejudice to the JD's rights to pursue the remainder unpaid under the same judgment if in case the JC defaults in its instalment payments. In any case, it is far too presumptuous for this court to presume this 'outside agreement' merely because the appellant has (in breach of the 13-year-old SJ) only partly paid the judgment sum up to a meagre sum of less than 10% of the judgment sum since as at 2018. The appellant cannot expect to conclude an 'outside agreement' with an 'ouster clause' (allegedly ousting the respondent's entitlement to rely on the 13-year-old SJ) merely by exhibiting proof of payments which not even come up to 10% of the judgment sum.

[52] Quite to the contrary, the part payments made and admitted would instead work against the appellant as the payments (without any protest) were clear acts admitting the truth and correctness of the 13-year-old SJ. If indeed the appellant had any genuine protest against the terms of the SJ, then the appellant would not have directly proceeded to serve and partly pay the judgment sum. The appellant cannot expect this court to allow the appellant to pay towards and admit the validity of the SJ in one breath and deny the validity of the same in the same breath.

[53] The Federal Court's decision in the case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 has cautioned against such adoption of contradictory stances:

When the parties to a transaction *proceed on the basis of an underlying assumption either of fact or of law* – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – *neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so". It would facilitate moral decadence within our social structure.* (emphasis added)

[54] Such approbating and reprobating of stances have also been cautioned against by the Court of Appeal in the case of *Cheah Theam Kheng v. City Centre Sdn Bhd (In Liquidation) & Other Appeals* [2012] 2 CLJ 16 which had held the following:

> In other words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers Plc v. News (UK) Ltd and Others* [1990] 3 All ER 376 at pp. 383 to 384: There is a principle of law of general application that *it is not possible to approbate and reprobate*. That means you are not allowed to blow hot and cold in the attitude that you adopt. *A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance*.
>
> (emphasis added)

[55] It would be severely remiss and unbecoming of this court to allow the appellant to renege against the position it had taken for the past 13 years. There must be finality in litigation and the respondent cannot be denied its rightful reliance upon the validity of the 13-year-old SJ which even to date was never formally challenged. Considering the fact of the total absence of formal application to set aside or vary the SJ coupled with the fact of the part payments made, it is infinitely more probable than not that the appellant is well aware of and has well admitted to the validity and correctness of the 13-year-old SJ.

[56] All of the aforementioned deliberations considered, this court finds no appealable error which would warrant this court's appellate intervention to the extent of looking beyond the bankruptcy notice. Thus, the landmark principle in the COA's decision in *Affin Credit*'s case shall apply (in that the court ought to be barred from delving beyond the judgment and examine the validity of the debt):

> Before us, learned counsel for the appellant submitted that the learned judicial commissioner (as he then was) had erred in law and fact *when he failed to consider that the court cannot at this stage go beyond the judgment and enquire into the validity of the debt as in doing so, would be tantamount to a collateral attack upon the final judgment of a court of competent jurisdiction* and that until the judgment in the original suit is set-aside, the bankruptcy notice in this case which conforms to the terms of the judgment, remains valid ...
>
> Again, with the greatest of respect, we are of the view that the learned Judicial Commissioner has failed to consider that the respondent has not raised this issue by way of a counterclaim or a cross claim in the original proceedings in civil suit No. D1-23-3911-87, in which the Judgment in default was obtained against him. *As such he cannot raise this issue in this application to set aside the bankruptcy notice as the Judgment in default has not been set aside*. (emphasis added)

This Court's Decision

[57] All aforementioned findings considered, it is resoundingly obvious that the facts and the law do not at all favour the appellant's plea to impugn the validity of the 13-year-old SJ. The fact that part-payments were made and that no application had ever been filed to set aside or vary the said SJ (even after 13 years) only adds further detriment to and discredit the appellant's case. Furthermore, this court must remark that the appellate court ought to be slow to altogether set aside any final judgment or order (especially a final judgment alike a summary judgment), when the challenge mounted against that final judgment or order is a mere technicality which does not affect or impugn the merits of that decision. This court draws guidance from the COA decision in *International Islamic University Malaysia v. Mohd Adnan Adrian Paul Holden Abdullah* which insightfully had held the following:

> *A technical non-compliance may be relied upon as an excuse to win a case but it can never replace the fairness and justice of a decision on the merits.*
>
> (emphasis added)

[58] Even if there is any legitimate merit in the appellant's case (which in the present care there were none), it should only be just and appropriate that the technical irregularity be cured by way of amendment and not by drastically setting aside the SJ altogether which had already been determined on its merits (and for many years until today went formally unchallenged by the appellant).

[59] Thus, the present appeal ought to be dismissed *in toto* and with costs of RM10,000 to be paid by the appellant to the respondent.